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Supreme Court, U.S.
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No. 99-1732

IN THE
SUPREME COURT OF THE UNITED STATES

TARA DAVENPORT, et al.,
Petitioners.

v.

YOUNG MEN'S CHRISTIAN ASSOCIATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT CUSTER SCHOOL DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTIONS PRESENTED

Have Petitioners properly invoked the jurisdiction of this Court given that their Petition for Rehearing in the Eighth Circuit was untimely?

Did the District Court appropriately refuse to stay Respondents' Motion for Summary Judgment where Petitioners did not seek a continuance from the District Court to complete additional discovery pursuant to FedRCivP 56(f)?

Can an action under 20 USC § 1681 (Title IX) be maintained against Respondent Custer School District, which did not conduct or participate in any demonstration by 10-12 year old participants in an all-female basketball tournament, designed to establish that the participants were, in fact, females?

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PERCEIVED MISSTATEMENTS OF FACT IN THE PETITION PURSUANT TO SUPREME COURT RULE 15(2)

A principal purpose for filing of this brief in opposition is to satisfy Respondents' obligation to point out perceived misstatements made in the Petition.

A grievous misstatement is found on page 4 of the Petition for Writ of Certiorari in the following sentence: "In addition, the behavior of performing physical examinations of infant children to determine gender in a public arena without the consent of parents is so egregious as to raise a novel question regarding the rules of acceptable behavior at athletic events when infants are involved." Petition for Writ of Certiorari, p. 4. The use of the phrase "public arena" in this sentence casts an entirely unfair and unsupported light upon the events that occurred at the YMCA all-girls invitational basketball tournament in Rapid City, South Dakota. As noted by the Eighth Circuit Court of Appeals, once a question regarding the gender of the players on the Loneman team had been raised, a female YMCA volunteer and a female chaperon traveling with the Loneman team went with the girls into a ladies' restroom, where each demonstrated that they were, in fact, females. According to the team's female chaperon and the Petitioners' own statements of undisputed material facts, this was done through the girls displaying bra straps and panty tops and, for girls not wearing either, the girls opened jersey tops and trunks for inspection. District Court Memorandum Opinion and Judgment (Petition for Writ of Certiorari, Appendix A, p. 13a.) The characterization placed on this situation by

Petitioners is intended to inflame the sensibilities of the Court, and is not an accurate reflection of the record nor the Complaint filed by Petitioners in the District Court for South Dakota.

On page i of the Petition, under the heading "QUESTIONS PRESENTED," it is stated that the investigation of the girls as to gender was "against their will." In the third paragraph of the same page, it is stated that the Petitioners were "forced to submit to a physical examination to determine gender." In the heading of Argument 3 in Petitioners' Petition, it is stated that the physical examination of the girls "against their will" is a violation of Title IX. Again on page 10 of their Petition, Petitioners state that the investigation conducted in the ladies' room at the YMCA was "over protest by the girls . . . ." These allegations fly directly in the face of the District Court's opinion that force was not used and was unnecessary since the players themselves wanted to resolve the issue. See District Court Memorandum Opinion and Judgment (Petition for Writ of Certiorari, Appendix A, p. 13a).

On page 2 of the Petition, Petitioners, referring to a meeting subsequently held at the Loneman school, characterized the meeting as "an attempt to cover up and make light of the search conducted at the tournament." Petition for Writ of Certiorari, p. 2. The District Court's Memorandum Opinion states that on January 9, 1996, coach Neugebauer and Athletic Director Anderson met with the Loneman team and their parents and "apologized for their conduct." The District Court went on to note that the January 12, 1996, meeting and healing

ceremony was held to allow YMCA officials to apologize for the incident, referring to Petitioners' own statement of undisputed material facts. See District Court Memorandum Opinion and Judgment (Petition for Writ of Certiorari, Appendix A, pp. 13a-14). The characterization of these events as a "cover up" is not based upon any evidence in this record.

Finally, Petitioners repeatedly assert to this Court that they "were not permitted the opportunity to hold depositions of the parties," Petition for Writ of Certiorari, p. 5; that "no depositions were permitted prior to the decision granting summary judgment," Petition for Writ of Certiorari, p. 7. The fact is, that from the date this action was commenced on December 2, 1997, through the issuance of the District Court's Memorandum Opinion and Judgment on October 29, 1998, Petitioners never requested a single deposition of any person, nor did they seek a continuance of the District Court's consideration of the Motions for Summary Judgment in order to allow depositions to occur.

JURISDICTION

Supreme Court Rule 13(3) provides that if a petition for rehearing is **timely filed** in the lower court, the ninety (90) days to file a petition for writ of certiorari runs from the date of the denial of the petition for rehearing. In Petitioners' Jurisdictional Statement, Petitioners assert that the Petition was filed within ninety (90) days from the denial of the Petition for Rehearing, which statement is accurate, but not complete. In fact, the Petition for

Rehearing was **not timely** filed in the lower court, as required by the Supreme Court Rule.

Petitioners below filed a motion on November 29, 1999, with the Eighth Circuit Court of Appeals requesting an extension of time to file the Petition for Rehearing. This motion was granted on November 30, 1999, extending the time until December 14, 1999. Thereafter, Petitioners' Petition for Rehearing was not timely filed under the extension granted by the Eighth Circuit. On December 22, 1999, Petitioners filed a motion to file the Petition for Rehearing out of time. On January 4, 2000, the Eighth Circuit by Order allowed the "untimely petition for panel rehearing" to be considered by the panel. An alternative request for rehearing *en banc* was denied as untimely. On January 28, 2000, the Petition for Rehearing was denied by the panel. Thus, contrary to this Court's rule, Petitioners' Petition for Rehearing filed with the Eighth Circuit was not timely filed.

Respondent Custer School District is mindful of this Court's decision in the case of Young v. Harper, 520 US 143, 117 SCt 1148, 137 LEd2d 270 (1997), where, in footnote 1 of the opinion, this Court discussed a similar situation. In the Young case, the petition for rehearing in the Tenth Circuit was filed two days late. According to this Court, the Tenth Circuit granted petitioners "leave to file a late petition for rehearing and suggestion for rehearing *en banc* . . . ." This Court also noted that thereafter, the Tenth Circuit treated the petition for rehearing as timely. By way of distinction, here, the Eighth Circuit specifically identified the request as an

"untimely petition." See Jan. 4, 2000, Order (Appendix A, p. 1a). This designation as "untimely" by the Eighth Circuit should bring this Petition within the ambit of this Court's Rule 13(3). Respondent Custer School District submits that Petitioners' Petition for Writ of Certiorari is jurisdictionally defective.

Review of this record reveals that this lack of timely filing is simply one more entry in a long history of dilatory and haphazard prosecution of this case by Petitioners. They have failed to meet the briefing schedule established by the Eighth Circuit, failed to designate the record, failed to follow the rules regarding addendum and appendix. The Eighth Circuit was ultimately forced to file an order directing Petitioners to show cause why the appeal should not be dismissed for failure to prosecute. See Order of February 26, 1999 (Appendix A, p. 2a). In the District Court, sanctions were imposed for Petitioners' failure to follow orders. The principal basis for the District Court's dismissal of Petitioners' action was Petitioners' continuing failure to move the case forward through discovery.

This pattern of behavior should not be tolerated by this Court and should result in denial of Petitioners' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENTS

ARGUMENT I

FedRCivP 56(f) requires that a nonmoving party must make some showing, by affidavit or otherwise, that a continuance is necessary to allow additional discovery in order to establish facts essential to the parties' opposition for summary judgment. In this case, Petitioners made no such showing. The granting of the Motions for Summary Judgment, as affirmed by the Eighth Circuit, was appropriate pursuant to this Rule.

ARGUMENT II

In order to state a claim against Respondent Custer School District, Petitioners must show that someone in a position of authority in the Respondent School District caused discrimination against the minor female Petitioners to occur. In this case, there has been no showing that Respondent Custer School District, as simply another participant in the YMCA girls' basketball tournament, was in a position to establish policy or conduct any kind of search or inspection of participants in an all-girls basketball tournament.

ARGUMENT I

A PARTY FACED WITH A MOTION FOR SUMMARY JUDGMENT MUST MAKE SOME SHOWING THAT ADDITIONAL DISCOVERY IS NECESSARY IN ORDER FOR THE PARTY TO DEVELOP FACTS TO SUPPORT THAT PARTY'S OPPOSITION TO THE MOTION.

Petitioners argue to this Court and argued to the Eighth Circuit that it was an abuse of discretion to grant Respondents' Motions for Summary Judgment because depositions had not been conducted. As noted by the Eighth Circuit Court of Appeals, the District Court granted the summary judgment motion because Petitioners had failed to come forward with evidence tending to prove that the conduct of any Defendant was motivated by race, sex, or age discrimination. The Eighth Circuit determined that Petitioners' attack on the District Court's action was without merit because they did not seek a continuance from the District Court in order to complete additional discovery. This ruling was based upon FedRCivP 56(f), and was a matter of some discussion by the District Court under the heading, "Summary Judgment Standard." The District Court's decision was based upon three modern cases of this Court, setting forth an analytical basis for treating motions for summary judgment. These cases, Anderson v. Liberty Lobby, Inc., 477 US 242, 106 SCt 2505, 91 LEd2d 202 (1986); Cilotex Corp. v. Catrett, 477 US 317, 106 SCt 2548, 91 LE2d 265 (1986); and Matsushita

Elec. Industry Co. v. Zenith Radio Corp., 475 US 574, 106 SCt 1348, 89 LEd2d 538 (1986); establish that it is incumbent upon a nonmoving party to establish significant probative evidence to prevent summary judgment.

In this case, the factual basis for the District Court's determination was taken principally from the Plaintiffs' own Undisputed Material Facts. This includes an undisputed material fact submitted by Petitioners that the girls were taken to a restroom, where some of the girls showed their bra straps and others, who did not wear bras, showed the tops of their panties to confirm they were indeed females. Any girls who did wear bear or parties opened their shirts and shorts to show they were females. In the privacy of the ladies' room in the setting of a single sex athletic event, this is hardly the egregious or shocking action Petitioners claim. Force was not used, and the players themselves wanted to resolve the issue.

Petitioners cannot claim a better state of facts than they themselves have alleged in their Complaints and pleadings. The Petition for Writ of Certiorari should not be granted.

ARGUMENT II

THE LOWER COURT PROPERLY DISMISSED RESPONDENT CUSTER SCHOOL DISTRICT WHERE THERE WAS NO SHOWING THAT ANY PERSON IN A POSITION OF AUTHORITY TOOK ANY ACTION OR INSTITUTED ANY POLICY IMPOSING SEX OR RACIAL DISCRIMINATION.

This Court, in Gebser v. Lago Vista Indep. School Dist., 524 US 274, 118 SCt 1989, 141 LEd2d 277 (1998), held that where a school district is being sued for the actions of one of its employees, under Title IX, the entity will not be held liable unless an official who has the authority to remedy the alleged discriminatory action has actual knowledge and is deliberately indifferent to the conduct. Clearly, principles of *respondeat superior* do not apply. The Custer School District is a public school district within the State of South Dakota, organized under the laws of the State of South Dakota.

The undisputed facts here show that a Custer School District employee, Ms. Neugebauer, was coaching the Custer School District, Loneman School girls' team at the YMCA girls' basketball tournament. As the District Court noted, Ms. Neugebauer was coaching her team in another game when the complained of inspection took place. She had no authority to require YMCA officials or anyone else to conduct any examination of any team member, nor did she have any

policy making authority within the Custer School District. No allegations nor factual showing whatsoever was put forward by Petitioners establishing any effective involvement of any Custer School District official in the events complained of.

CONCLUSION

The District Court properly dismissed Custer School District from this action, and the Petitioners' Petition for Writ of Certiorari should be denied.

Dated this 30th day of May, 2000.

Respectfully submitted,

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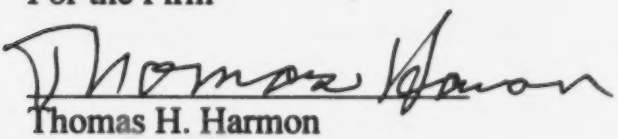
For the Firm



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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-1037SDRC

Tara Davenport, et al.	*	
	*	
Appellants,	*	Appeal from the
	*	United States District
vs.	*	Court for the District
	*	of South Dakota
Young Men's Christian	*	
Association, et al.	*	
	*	
Appellees.	*	

The motion to file an untimely petition for panel rehearing is hereby granted, and the petition shall be considered by the panel. Appellant Tara Davenport's alternative request for rehearing en banc is denied as untimely.

January 4, 2000

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1037SDRC

Tara Davenport, et al.	*	
	*	
Appellants,	*	Appeal from the
	*	United States District
vs.	*	Court for the District
	*	of South Dakota
Young Men's Christian	*	
Association, et al.	*	
	*	
Appellees.	*	

On consideration of appellees' motion to dismiss, appellants are directed to show cause, within fifteen (15) days of the date of this order, why this appeal should not be dismissed for failure to prosecute.

See 8th Cir. R. 3C.

February 26, 1999

Order Entered Under Rule 27B(a):
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit